

**The Free State Foundation**  
**P. O. Box 60680**  
**Potomac, MD 20859**  
**301-984-8253**

November 6, 2017

**Re: WC Docket No. 17-108; Restoring Internet Freedom**

**EX PARTE SUBMISSION**

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Dear Ms. Dortch:

On November 6, 2017, I, along with Free State Foundation Research Associate Michael Horney, met with Jay Schwarz, Wireless Advisor to Chairman Pai, to discuss the above-referenced proceeding.

We discussed the contentions contained in the Free State Foundation's initial and reply comments and written ex parte submissions, all of which have been filed in the public record, focusing on the following points:

- Broadband Internet Access Services are Title I "information services" and not Title II "telecommunications services" under the text and structure of the Communications Act. Therefore, the FCC does not possess authority to regulate broadband Internet service providers (ISPs) as common carriers and impose harmful public utility regulation on ISPs.
- The Title II order has curtailed broadband network investment so that it is less than it otherwise would have been absent the Title II order. FSF estimates the decline in investment since adoption of Title II order at \$5.6 billion. Taking into account a multiplier effect, our cost-benefit analysis estimates \$7 - \$9.8 in lost economic activity since the adoption of the Title II order.
- The FCC lacks authority under Section 706 to regulate broadband ISPs' practices.
- Following Title I classification, the FTC and Department of Justice will have authority, expertise, and capability to address and resolve consumer harm and anticompetitive concerns regarding ISP practices.
- Mobile broadband is a private service, not a common carrier service.

- Despite the foregoing jurisdictional limits on the FCC’s authority, if the Commission nevertheless determines that it possesses some authority to regulate broadband Internet access services, it should adopt a circumscribed regulatory regime based on a commercial reasonableness standard that should be applied on a case-by-case basis. The commercial reasonableness standard should require findings, based on clear and convincing evidence of demonstrated market failure and consumer harm, before any enforcement action is taken against an ISP. If the Commission implements a circumscribed regulatory regime, it should consider employing rebuttable deregulatory presumptions like those adopted by the Commission in its 2015 *Effective Competition Order* involving the competitiveness of local cable markets. This order was upheld by the DC Circuit in July 2017 in *NATOA v. FCC*.
- Paid prioritization agreements, which often benefit consumers, should be permitted absent specific findings of market failure and consumer harm made on a case-by-case basis.

Thank you for including this ex parte submission in the *Restoring Internet Freedom* record.

**Sincerely,**

/s/ Randolph J. May

Randolph J. May

President, The Free State Foundation  
The Free State Foundation

cc: Jay Scharwz